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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 664.

PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, and CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY, *Respondents*.

SUPPLEMENTAL BRIEF OF RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION, IN ANSWER TO PETITIONER'S "ADDENDUM TO SUPPLEMENTAL BRIEF."

S. R. PRINCE,
F. B. GRIER,
CARL H. DAVIS,
WILLIAM C. BURGER,
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Solicitors for said Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner has re-filed its Supplemental Brief with an Addendum calling attention to the recent decision by the District Court for the Northern District of Illinois in the case of *United States v. Chicago, North Shore & Milwaukee R. Co.*, a case arising under section 20a, as to securities issue.

That decision stands alone, as the only decision of a federal court, save the reversed decision by the Circuit Court of Appeals in the *Texas & Pacific Case*, 4 F. (2d) 904, which approaches the question of construction from the viewpoint of stressing the strictly literal words of the exception as controlling the intent of the remedial provisions. It, therefore, merits brief consideration.

That court did not render an opinion to enlighten as to its reasoning. We have only its findings of fact and conclusions of law, copy of which petitioner attaches as an appendix to its additional brief.

District Judge Woodward's conclusions of law are broader than the case before him required. His question was whether the Chicago, North Shore & Milwaukee, upon the facts shown and found, was an "interurban electric railway, which is not operated as a part of a general steam railroad system of transportation," within the meaning of paragraph (1) of section 20a. He did not confine his conclusion of law to the holding that it was, but went much further and concluded that:

> "The letter, as well as the spirit of the Interstate Commerce Act as amended by Transportation Act, 1920, clearly excludes from section 20a of the Interstate Commerce Act, and from other sections thereof, *independently operated electric railways* * * *" (Italics ours.)

Only section 20a was before that court for construction. The conclusion is *obiter* as to other sections.

To dismiss the bill of complaint before it, it was not necessary for that Court to announce the broad conclusion that all independent electric railways are excluded from Commission authority under section 20a. To the extent that that conclusion went beyond the exigencies of the particular case, it is *obiter*.

On the facts, that case is sharply distinguishable from this. To say the least, the Chicago, North Shore & Mil-

waukee is close to the "interurban" border line, whereas the Piedmont & Northern is far from the border line. It could well be concluded that the North Shore is essentially and predominantly an interurban, engaged in an interurban business, without concluding that Congress by "interurban electric railways" meant to describe all independently operated electric railroads. But the Piedmont & Northern cannot be held to be within that term unless all independent electric railways are free to extend or abandon without certificate.

The North Shore, as shown by the Court's findings, is predominantly devoted to the business of a "between city" service, between Chicago and Milwaukee and cities between. It operates regular elevated, rapid transit lines in Chicago of 16 miles and jointly operates with a rapid transit company over 8 miles of elevated tracks through Chicago and Evanston to Wilmette. It operates an interurban "Shore Line." Its interstate line runs to Milwaukee and over street car lines in that city, over which it has ordinance authority to operate only "its interurban cars." Its "Libertyville Branch" appears to be a suburban line. Its "Waukegan Branch" runs from North Chicago Junction 3.29 miles to Waukegan and there is the only street car line, performing all urban service. That line engages in an "interurban express" business and an urban street railway business.

Of the total trackage of the company, 14.66 per centum is street railway trackage. Much of its rail, frog and switch equipment is special street railway type. It uses cross-over tracks over which its main line trains operate but over which steam trains could not operate.

It operates a ferry truck service of container cars hauled by tractors. Less than carload merchandise is handled in baggage cars, motored and trailer, of small capacity as compared with steam railroad freight cars. It has motor merchandise dispatch type refrigerator cars. Nearly

half of its freight cars are too light in construction to be interchanged with steam railroads.

Its predominant business is interurban passenger service. Ninety-six per centum of its passenger business is local. Passenger service produces 78 per centum of its total revenues. The principal part of the 22 per centum of its business which is merchandise carriage is "merchandise despatch service performed in baggage type cars." Only 8.47 per centum of its total revenues comes from transportation of interline freight. Compare Piedmont & Northern, 94.5 per centum of whose total revenues come from freight, of which 95.7 per centum is from interline interchange and 80.7 per centum from interstate freight. (R. 417-418.)

It is impossible for the North Shore to handle carload freight in standard freight equipment on 31.47 route miles, or 22.73 per centum, of its total mileage. The Piedmont & Northern handles such equipment on every mile of its lines. (R. 412.)

There is no finding that the North Shore hauls long trains of freight cars. The Piedmont & Northern hauls solid trains of as many as 65 freight cars. (R. 413.)

The North Shore operates through cities under ordinance restrictions requiring safety stops, stops at intersections, lighting streets and crossings, paving and sprinkling streets and removing snow. In 6 towns it is prohibited from handling freight. It pays a $50.00 license fee to Chicago for every car operated over the elevated railway.

Manifestly the predominant business of the North Shore is wholly different from that of the Piedmont & Northern. It may well be classed as an "interurban" without any analogous inference that the Piedmont & Northern is such. Classified according to predominant business, it would fall in a wholly different category from the Piedmont & Northern.

The facts as to the North Shore's business are summed up by Judge Woodward's finding that, "Respondent performs a street car service, a suburban service and an interurban service."

The facts as to the Piedment & Northern's business are summed up in Judge Glenn's finding (R. 423-424) that it is predominantly engaged in the same essential interchange, interstate business as the steam freight carriers of the territory and that its purely local or interurban business is inconsequential.

Again, it appears that Judge Woodward gave great consideration to the argument of inconvenience. He pointed out that the North Shore and its predecessor had issued $61,662,600.00 par value of bonds since the passage of the Transportation Act, all issued under authority of state commissions, and that $38,935,608.07 of such securities issued under state authority alone were outstanding, all of which securities would have been manifestly void if section 20a applied. He found that $239,000,000.00 par value of securities have been issued by electric railroads reporting to the Commission, other than the North Shore, since the passage of the Transportation Act, without certificate of the Interstate Commerce Commission under section 20a.

Plainly the fact that railroads subject to 20a may have issued even large amounts of securities in violation thereof cannot be a proper basis for a conclusion that they are not, therefore, subject to the section. This is altogether an argument *ab inconvenienti*.

But no such argument applies to the Piedmont & Northern. It has issued no securities since 1914. (R. 409-410, finding 16.)

It is inevitable that every case must stand on its own facts, and be determined by the gradual process of judicial inclusion and exclusion, as to whether a particular electric railroad is subject to or free from regulation under paragraph (18) and section 20a, unless it is to be held that

the word "interurban" in the exceptions is surplusage and that Congress excluded what it did not say it excluded, *i. e.*, all independent electric railroads.

In its addendum to its Supplemental Brief, p. 19, petitioner weakens on its own doctrine. It says:

> "Petitioner does not argue that a transcontinental steam railroad, or a steam railroad engaged in the long haul of heavy load traffic and the operation of through passenger trains between widely separated sections of the country, would merely by abolishing steam and adopting electricity as a motive power become an interurban electric railway."

Why not? It would be an independent electric railroad operating between cities. And it is the whole thesis of petitioner that paragraph (22) exempted all independent electric railroads operating between cities.

Petitioner now admits that a line must be drawn somewhere. A line can only be marked out on the doctrine declared by the District Court below and by the decisions of this Court cited on our main brief. And unless a line is to be drawn, any independent steam railroad, by wholly electrifying its line, would automatically become an independent electric railroad operating between cities and exempt by paragraph (22), if petitioner's theory of this case be sound.

We submit that the decision in the *North Shore Case* is no support for petitioner's position here.

Respectfully submitted,

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